152 U.S. 505

RECORD, CASE No. 14,206.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 214.

MOSES MANUEL, PLAINTIFF IN ERROR,

vs.

IVER WULFF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED OCTOBER 4, 1890.

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1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the honorable judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court of the State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Iver Wulff and Moses Manuel, wherein was drawn in question the construction of the naturalization laws and mineral land laws of the United States and the decision was against the rights specially set up under such naturalization and mineral land laws, a manifest error hath happened, to the great damage of the said Moses Manuel, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of April, in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, District of Montana, 1890.]

GEORGE W. SPROULE,
Clerk of the Circuit Court of the District of Montana.

Allowed by—

HENRY N. BLAKE,
Chief Justice of the Supreme Court, State of Montana.

3 [Endorsed:] The Supreme Court of the United States. Moses Manuel, pl'ff in error, *vs.* Iver Wulff, def't in error. Writ of error. Filed April 16th, 1890. W. J. Kennedy, clerk supreme court of Montana. McConnell & Clayberg, att'ys for pl'ff in error.

4 Supreme Court of the United States, October Term, A. D. 1890.

MOSES MANUEL, Plaintiff in Error,)
vs.
IVER WULFF, Defendant in Error.)

Assignments of Error.

Afterwards, to wit, on the first Monday in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Moses Manuel, by McConnell & Clayberg, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. In affirming the ruling of the lower court in nonsuiting the said plaintiff in error, Moses Manuel, upon his cross-complaint, and in deciding that the naturalization of the said Manuel during the trial in the court below did not retroact so as to cure the defects in his title by reason of his having been an alien previous thereto.

2. In affirming the ruling of the lower court in refusing to nonsuit the said defendant in error, Iver Wulff, and in deciding that the said plaintiff in error, Moses Manuel, could not under his pleadings take advantage of the want of title in the said defendant in error, Iver Wulff, by reason of Fred. Manuel, through whom the said Wulff claimed title, having been an alien at the time he is alleged to have held and passed title.

3. There is also error in this, to wit, that by the record
5 aforesaid it appears that the judgment aforesaid given was given for the said Iver Wulff against the said Moses Manuel, whereas by the law of the land the said judgment ought to have been given for the said Moses Manuel against the said Iver Wulff, and the said Moses Manuel prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, etc.

McCONNELL & CLAYBERG,
Attorneys for Plaintiff in Error.

6 ("Endorsed:") Supreme Court of the United States. Moses Manuel, plaintiff in error, *vs.* Iver Wulff, defendant in error. Assignments of error. Filed April 15th, 1890. W. J. Kennedy, clerk supreme court of Montana. McConnell & Clayberg, attorneys for p'l'ff in error.

7 STATE OF MONTANA:

In the Supreme Court.

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that in obedience to the mandate of the within writ of error a duly certified transcript, under the said seal of said court, of the record and proceedings in the case therein stated, with

all things concerning the same, except as in the certificate thereof, is hereto attached.

In testimony whereof I hereto set my hand as clerk of said supreme court and affix the seal of said court at my office, in the city of Helena, this 17th day of April, A. D. 1890.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY, *Clerk.*

8 The United States of America to Iver Wulff, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein Moses Manuel is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the State of Montana.

Service of a copy of the above citation accepted this 16th day of April, 1890.

WADE, TOOLE & WALLACE,
Attorneys for Iver Wulff.

9 [Endorsed:] The Supreme Court of the United States. Moses Manuel, plaintiff in error, *vs.* Iver Wulff, def't in error. Citation. Filed April 16th, 1890. W. J. Kennedy, clerk supreme court of Montana. McConnell & Clayberg, att'ys for pl'ff in error.

10 STATE OF MONTANA:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Montana, begun and held in the city of Helena, at the court-house, on the sixth day of January, in the year of our Lord one thousand eight hundred and ninety, were the following proceedings on the 15th day of February, A. D. 1890, a day of said term, in the case of Iver Wulff, respondent, *vs.* Moses Manuel, appellant.

(*Transcript and Return.*)

11 In the District Court, 1st Judicial District, Lewis and Clarke County, Montana Territory.

IVER WULFF, Plaintiff,)
vs.
MOSES MANUEL, Def't.)

The plaintiff complains of the defendant and alleges:—

I. That the plaintiff is a citizen of the United States of America and as such is entitled to acquire title to the mineral lands thereof; that he is now and for a long time prior heretofore has been in possession of that certain lot, piece, or parcel of land situate, lying, and being in the county of Deer Lodge, Territory of Montana, known as the Columbia Lode mining claim, being a tract of land, say, 600 feet in width by 1,500 feet in length, in unorganized mining district, in said county, adjoining the Josephine Lode mining claim on its eastern boundary, which Josephine Lode mining claim is known by that name and fully described in survey = 2142, in the office of the United States surveyor general at Helena, Montana. The said Columbia Lode mining claim is distinctly marked by stakes
12 and monuments thereon so that its boundaries can be readily traced, and a notice of the location thereof was filed in the office of the county recorder of Deer Lodge county July 8, 1882, and the same is recorded in Book "M" of Lode Locations, in said office, on page 544, to which reference is hereby made for a more particular description thereof.

II. That the plaintiff claims title to the said land and premises by virtue of a discovery made thereon of valuable ore and rock in place with one well-defined wall, and of the lawful location thereof as a quartz mining lode claim, by name the Columbia Lode mining claim, which Columbia Lode mining claim location was duly made on the 1st day of July, 1882, by Henry Pflaume, a citizen of the United States, and by subsequent sales and transfers became the property of the plaintiff on the 30th day of November, A. D. 1887.

III. That ever since the 1st day of July, 1882, and for each of the years 1882, 1883, 1884, 1885, 1886, & 1887 the plaintiff and his grantors have duly performed work and labor exceeding the sum of one hundred dollars in value each and every of said years,
13 in and upon the said Columbia Lode mining claim, and have extracted valuable ore therefrom, and have in all respects fully complied with all of the laws, rules, and regulations of the United States and Territory of Montana relating thereto.

IV. That the defendant on or about the 18th day of November, A. D. 1887, filed in the United States land office at Helena, Montana, an application for a United States patent for a pretended lode mining claim, naming the same the Marshal Ney Lode mining claim, — includes a portion of said Columbia Lode mining claim, to wit, the whole of said Marshal Ney Lode mining claim

is described as being and lying within the boundaries of the said Columbia Lode mining claim, and the defendant seeks by said pretended Marshal Ney Lode mining claim to acquire a patent to about $\frac{5}{6}$ of the said Columbia Lode mining claim by placing the lines and boundaries of the said pretended Marshal Ney Lode mining claim entirely upon and just within the boundaries of the said Columbia Lode mining claim; that on or about the 17th day of January plaintiff filed a contest in the land office aforesaid claiming the above ground.

14 V. That the claim of the defendant is without any right whatever, and the said defendant has not any estate, right, title, or interest whatever in the said land or premises or any part thereof, and that his claim thereto casts a cloud upon the title of the plaintiff to the said land, to plaintiff's great damage and detriment.

Wherefore plaintiff prays:

I. That the defendant may be required to set forth the nature of his claim, and that all adverse claim of the defendant may be determined by a decree of this court.

II. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said land or premises or any part thereof, and that the title of plaintiff thereto is good and valid.

III. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and for such other relief as to the honorable court shall seem meet and agreeable to equity and for his costs of suit.

E. W. TOOLE & J. W. KINSLEY,
Plaintiff's Attorneys.

Duly verified by plaintiff on the 1st day of February, A. D. 1888, before—

J. W. KINSLEY,
Notary Public.

15 (Title of Court.) (Title of Cause.)

Now comes the defendant in the above-entitled action, and for answer to plaintiff's complaint on file herein—

1. Admits that the plaintiff is a citizen of the United States.

2. Denies that he is now and for a long time prior heretofore has been in possession or entitled to the possession of that certain lot, piece, or parcel of land or any part thereof situate, lying, and being in the county of Deer Lodge, Territory of Montana, known as the Columbia Lode mining claim, being a tract of land 600 feet in width by 1,500 feet in length, adjoining the Josephine Lode mining claim on its easterly boundary (which Josephine Lode mining claim is known by that name and fully described in survey No. 2142, in the office of the United States surveyor general at Helena, Montana), and denies on information and belief that the said Columbia Quartz Lode mining claim is distinctly or at all marked

by stakes, monuments, or otherwise so that its boundaries can be readily or at all traced, and denies on information and belief that a notice of location thereof was filed for record in the office of
16 the county recorder of Deer Lodge county on the 8th day of July, A. D. 1888, or at any other time, and recorded in Book "M" of Lode Locations, in said office, at page 544.

3. Denies that the plaintiff has any claim or title to said land and premises or any part thereof by virtue of a discovery made thereon of valuable ore or rock in place or by virtue of any discovery with one well-defined or any wall and of the lawful or any location thereof as a quartz-lode mining claim or otherwise by name of Columbia Lode mining claim or any other name, and denies on information and belief that the said Columbia Lode mining-claim location was duly made on the 1st day of July, 1882, or at any other time by plaintiff or his predecessors in interest, or that plaintiff or his predecessors in interest ever made any discovery upon said land or any part there of of valuable or any rock and ore in place with one or any well-defined wall, and denies that plaintiff or his predecessors in interest ever made any lawful location upon said land or any part thereof or that plaintiff ever became the owner of said property or any part thereof in any manner whatever.

4. Denies on information and belief that ever since the said first day of July, 1882, and for each or any of the years 1882,
17 1883, 1884, 1885, 1886, and 1887 the plaintiff and his grantors or any one in his or their behalf have duly or otherwise performed work and labor exceeding one hundred dollars in value or of any value whatever each and every year or any of said years in and upon said pretended Columbia Lode mining claim, and denies that plaintiff and his grantors have in all respects or in any respect fully or at all complied with all or any of the laws, rules, and regulations of the United States and Territory of Montana relative thereto.

5. Admits that defendant on or about the 18th day of November, 1887, filed in the United States land office at Helena, Montana, an application for a patent for the Marshall Ney Quartz Lode mining claim, and admits that the application for said patent for said Marshall Ney Quartz Lode mining claim includes a part or portion of the said pretended Columbia lode of plaintiff.

6. Denies that the claim of defendant to said Marshall Ney Quartz Lode mining claim is without any right whatever and that the said defendant has no estate, right, title, or interest in said land or premises, and denies that his claim thereto casts a cloud upon
18 the title of this plaintiff to said land, to plaintiff's great or any damage or detriment.

And for further answer and by way of cross-complaint defendant alleges:

1. That he is now and at all the times hereinafter mentioned was a citizen of the United States.

2. That on or about the 15th day of March, A. D. 1885, one Alfred Manuel, who was then and is now a citizen of the United States,

entered upon a part and portion of the public domain of the United States which were unoccupied and open for location and appropriation and discovered within the boundaries of the claim thereafter located by him a lead, lode, or vein of mineral-bearing quartz rock and earth in place, with at least one well-defined wall; that thereafter, to wit, on the said 15th day of March, 1885, the said Alfred Manuel located and claimed a quartz lode mining claim, 1,500 feet in length and 600 feet in width, along said vein or lode, and named and designated the same the Marshall Ney Quartz Lode mining claim, and thereafter and on the same day distinctly marked the boundaries of the claim so located by substantial posts or
19 monuments at each corner thereof, so that the same could and can be readily traced on the surface; that thereafter said Alfred Manuel caused to be filed in the office of the county clerk and recorder of Deer Lodge county, Montana Territory, a duly verified declaratory statement of discovery of and claim to said Marshall Ney Quartz Lode mining claim, containing the name of the locator, the date of location, and such a description of said claim, by reference to natural objects and permanent monuments, that the same could and can be readily traced and identified, which said notice of location was duly recorded in the office of the county clerk and recorder of Deer Lodge county, M. T., said Marshall Ney Quartz Lode mining claim, as described in said notice of location so recorded, is as follows, to wit: "The Marshall Ney Quartz Lode mining claim, situate, lying, and being in Little Blackfoot (unorganized) mining district, Deer Lodge county, M. T., beginning at discovery and running 600 feet easterly, thence 300 feet northerly to stake marked 'A,' thence 1,500 feet westerly to a stake marked 'B,' thence 600 feet southerly to stake 'C,' thence 1,500 feet easterly to stake 'D,' thence 600 feet northerly to stake 'A,' the place of beginning."

20 3. That the said Alfred Manuel in all respects fully complied with all the requirements of the laws of the United States, the Territory of Montana, and the local customs, rules, and regulations of miners in and about the location of said claim.

4. That on the 12th day of October, A. D. 1885, the said Alfred Manuel by a certified deed of conveyance, bearing date on said 12th day of October, A. D. 1885, and recorded in the office of the county clerk and recorder of Deer Lodge county on the 14th day of October, 1885, in Book "Y" of Deeds, at page 101, of the records of said county, conveyed to this defendant an undivided one-third ($\frac{1}{3}$) interest in and to the said Marshall Ney Quartz Lode mining claim; that thereafter and on the 15th day of October, 1887, the said Alfred Manuel by another certain deed of conveyance, bearing date on said 15th day of October, A. D. 1887, and recorded in the office of the county clerk and recorder of Deer Lodge county on the 17th day of October, A. D. 1887, in Book "3" of Deeds, at page 165, conveyed his remaining two-thirds ($\frac{2}{3}$) interest in and to the said Marshall Ney Quartz Lode mining claim to this defendant.'

5. That this defendant by virtue of such conveyances became

and now is the owner of said Marshall Ney Quartz Lode mining claim and the whole thereof.

21 6th. That this defendant and his grantors since the said 15th day of March, A. D. 1885, have been and now are in the sole, quiet, and peaceable possession and entitled to the sole, quiet, and peaceable possession of the said Marshall Ney Quartz Lode mining claim and the whole thereof.

7. That it is a part and portion of this said Marshall Ney Quartz Lode mining claim so located and claimed by defendant as aforesaid which plaintiff claims is in conflict with his pretended Columbia Lode mining claim and which he alleges casts a cloud upon his pretended title to said claim.

8. The defendant therefore alleges that the pretended location and claim of said Columbia Lode mining claim of plaintiff casts a cloud upon defendant's title and right of possession to said Marshall Ney Quartz Lode mining claim.

9. That for more than two years prior to the date of location by defendant's predecessors in interest of the Marshall Ney Quartz Lode mining claim no work of any kind, character, or description has been done upon the pretended Columbia Quartz Lode mining claim, and that the said pretended Columbia Quartz Lode mining claim location had been fully abandoned and the land covered thereby was open to location.

22 Wherefore this defendant prays that this court by its decree in this action will quiet the title and possession of this defendant in and to all conflict between said pretended Columbia Lode mining claim and defendant's Marshall Ney Quartz Lode mining claim and the whole thereof.

And defendant asks for his costs in this action.

CARTER & CLAYBERG,
Attorneys for Defendant.

Duly certified by defendant on the 1st day of June, A. D. 1888, before—

GEORGE O. FREEMAN,
Notary Public.

(Title of Court.) (Title of Cause.)

Now comes the plaintiff and, replying to the new matter and cross-complaint set out in defendant's answer—

1. Denies that the defendant is now a citizen or ever was a citizen of the United States of America.

2. Denies that on or about the 1st day of March, 1885, nor at any other time one Alfred Manuel nor any other person entered upon any of the tracts or parcels of land described in plaintiff's complaint or in defendant's answer when the same or any of it was a part of the public domain of the United States, unoccupied or open for location or appropriation, or that any discovery was made

23 thereon of a lead, lode, or vein of mineral-bearing quartz or earth in place with any walls, except the discovery and location referred to in plaintiff's complaint.

3. Denies on information and belief that on or about the 15th day of March, 1885, or at any other time or at all Alfred Manuel or any other person located or claimed a mineral-lode or a quartz-lode mining claim of any size or dimension whatever or named or designated the same or distinctly or otherwise marked the boundaries of any claim in or upon any of the lands referred to in plaintiff's complaint or defendant's answer, or that the said Alfred Manuel or any other person filed or caused to be filed in the office of the clerk and recorder of Deer Lodge county, Montana, or elsewhere any declaratory statement or notice whatsoever, or that any declaratory statement or notice whatsoever was ever filed or recorded in said office of said county clerk aforesaid in any manner referring to any of the land referred to in plaintiff's complaint or defendant's answer, except such location, filing, and recording as is mentioned in plaintiff's complaint.

4. Denies that Alfred Manuel or defendant *have* in any respects or at all, or that any other person has in any respects or at all, complied with any of the requirements of the laws of the United States or the Territory of Montana or the customs or rules or regulations of miners in or about the location of any claim or any lands mentioned in plaintiff's complaint or defendant's answer, except such as are mentioned in plaintiff's complaint.

5. Denies on information and belief that on the twelfth day of October nor at any time or at all Alfred Manuel or any other person conveyed by deed or otherwise any of the lands mentioned in plaintiff's complaint or defendant's answer, or that the defendant ever was the owner nor entitled to the possession of any of said lands.

6. Denies that the defendant nor his grantors were ever in possession or entitled to the possession of any of the lands mentioned in plaintiff's complaint or defendant's answer.

7. Denies that plaintiff's location and claim of his "Columbia Lode mining claim" casts any cloud on any title defendant has or any right or possession he has, but avers the fact to be that the defendant has no right, title, or interest in or to any lands near the plaintiff's "Columbia lode" aforesaid.

8. Denies that plaintiff ever abandoned any of the lands mentioned in his complaint or that any of the same has ever been open to location since July 8th, 1882.

E. W. TOOLE & J. W. KINSLEY,
Attorneys for Plaintiff.

Duly verified by plaintiff on the 25th day of May, A. D. 1889, before—

J. W. KINSLEY,
Notary Public.

(Title of Court.) (Title of Cause.)

Judgment and Decree.

This cause came on regularly for trial on the 28th day of May, 1889, J. W. Kinsley & Wade, Toole and Wallace appearing as counsel for plaintiff, and McConnell, Carter & Clayberg for the defendant. A trial by jury having been waived by the respective parties, the case was tried before the court setting without a jury; thereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined, and the evidence being closed the cause was argued and submitted to the court for consideration and decision, and after due deliberation thereon the court finds that the matters and things contained in the plaintiff's complaint are true, and that the plaintiff is the owner of, entitled to the possession of, and in the possession of the Columbia Lode mining claim, so called, situate, lying, and being in the county of Deer Lodge,
26 Territory of Montana, being a tract of land 600 feet in width by 1,500 feet in length, in an unorganized mining district of said county, which said Columbia Lode mining claim adjoins the Josephine Lode mining claim on its eastern boundary, which Josephine Lode mining claim is fully described in survey No. 2142 in the land office of the United States at Helena, Montana; that said Columbia Lode mining claim contains a discovery made thereon containing valuable mineral deposits in place with at least one well-defined wall, and that notice of the discovery and location of said Columbia Lode mining claim was recorded in the office of the county clerk and recorder of Deer Lodge county on the 8th day of July, 1882, in Book "M" of Lode Locations, page 544, to which reference is made for more particular description of the boundaries of said claim.

II.

That the claim of the defendant to a portion of the said Columbia Lode mining claim under and by virtue of his location of the Marshall Ney Quartz Lode mining claim is without foundation and void, and that the said defendant's claim to a portion of said Columbia Lode mining claim, as described in said defendant's an-
27 swer, is a cloud upon the title of the plaintiff to said Columbia Lode mining claim.

III.

The court further finds that the plaintiff has done and performed all the acts and things necessary to entitle him to a patent of the said Columbia Lode mining claim as the same is described in the plaintiff's complaint.

Now, therefore, it is hereby ordered, adjudged, and decreed that the said plaintiff be, and is hereby, declared the owner of, in possession of, and entitled to the possession of the said Columbia Lode mining claim, and that the claim of the defendant is a cloud upon the title of the plaintiff, and the said claim of the defendant is declared void and unavailing as against the title of the plaintiff, and

that plaintiff recover his costs and disbursements incurred in this action, taxed at — dollars.

Witness my hand this 28th day of May, A. D. 1889.

HENRY W. BLAKE,
Judge First Judicial District, Montana Ter.

28 (Title of Court.) (Title of Cause.)

To J. W. Kinsley and Wade, Toole and Wallace, attorneys for plaintiff:

You will please take notice that the defendant, Moses Manuel, intends to move the court to vacate and set aside the final judgment of the court made and entered in the above-entitled action on the — day of May, A. D. 1889, in favor of the plaintiff and against the defendant for the Columbia lode, as described in plaintiff's complaint filed in said action, and to grant a new trial in said cause upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the verdict, and that such verdict is against the law.

2nd. Errors of law occurring at the trial and excepted to by the defendant:

First. The court erred in holding that the plaintiff, Wulff, could derive his title through Fred. Manuel, who was an alien at the time he received his title from Pflaume.

Second. The title escheated to the Government of the United States when conveyed by Pflaume to Fred. Manuel and became a part of the public domain, and hence it was error to give judgment for the plaintiff.

29 Said motion will be based upon a statement of the case, hereafter to be prepared.

Dated Helena, June 29th, 1889.

McCONNELL, CARTER AND CLAYBERG,
Attorneys for Defendant.

Service of copy of within notice accepted this 29th day of June, A. D. 1889.

WADE, TOOLE & WALLACE,
Attorneys for Pl'ff.

(Title of Court.) (Title of Cause.)

Statement of Case on Appeal.

The following statement of the case on appeal was settled by the court:

The following statement was made, settled, and considered by the court upon motion for new trial, p. 28:

This was an action brought under section — of the U. S. Revised Statutes, to determine who was entitled to a certain mineral claim called in the declaratory statement of the plaintiff the Columbia lode and that of the defendant the Marshall Ney lode.

On the 28th day of May, A. D. 1889, the above-entitled action

came on for trial before the court, a jury having been expressly waived by the parties thereto, when the witnesses testified in
30 relation to the matters and things set forth in their testimony as follows:

Henry Pflaume.

Henry Pflaume was called on the part of the plaintiff and, being sworn, testified as follows, to wit:

I reside at Helena, and located the Columbia Lode mining claim in 1882. I was a citizen of the United States at the time. On the last day of November, 1885, I deeded this property to Fred. Manuel and executed a deed to him of conveyance of this property, which deed was placed upon record in Deer Lodge county on the 2nd day of January, 1888. The Columbia lode, as known to the plaintiff in this case, and the Marshall Ney, as known to the defendant, constituting the subject of this litigation, involve the same ground.

Fred. Manuel.

Fred. Manuel was next called for the plaintiff and sworn, and testified substantially as follows:

Mr. Pflaume executed a deed to me which conveyed the property known as the Columbia Lode mining claim, executed on the 1st day of November, A. D. 1885. On the 30th day of November, 1887, I made a conveyance of this property by deed to Iver Wulff, who is the plaintiff in this case.

Iver Wulff.

31 Iver Wulff was next called and sworn, and testified substantially as follows, to wit:

I am the plaintiff in this action. The property in controversy, under the name of the Columbia lode, was conveyed to me by Fred. Manuel on the 30th day of November, 1887, at which time he executed a deed to the property, which deed was placed upon record, in the proper county, on the 3rd day of January, 1888, since which time I have been and am now the owner of the property.

Testimony on Behalf of Defendant.

ALFRED MANUEL:

Alfred Manuel was called for the defendant and sworn, and testified substantially as follows, to wit:

I located the Marshall Ney. I am a citizen of the United States. On the 12th day of October, 1885, I conveyed to Moses Manuel, the defendant in this case, one-third of the Marshall Ney Lode mining claim, which conveyance was evidenced by deed, duly executed, which deed was recorded in the proper county on the 12th day of October, 1885, and on the 15th day of October, 1887, I conveyed to him (Moses Manuel) my remaining two-thirds interest in the Mar-

shall Ney lode by deed, duly executed, which said deed was
32 filed for record, in the proper county, on the 17th day of October, 1887. I located the Marshall Ney because I thought the Columbia lode had been abandoned. I located the Marshall Ney on the — day of March, 1885, and duly represented it until I conveyed it to Moses Manuel.

Moses Manuel.

Moses Manuel, the defendant, was next called and sworn, and testified substantially as follows, to wit:

I am the grantee of the Marshall Ney, as evidenced by the deed from Alfred Manuel to me. I am a citizen of the United States. That I bought the Marshall Ney lode from Alfred Manuel and paid cash for it, and have kept the same represented to the present time, and that the Columbia lode was abandoned in 1883 and not represented in 1884.

Cross-examined by Mr. KINSLEY:

I am a citizen like any other infant who comes here when they are under age and their father became a citizen. I was born in Canada. I have never taken out any papers myself. I came to this country in 1856, I think. I was eight years old then. My father is a citizen of the United States. He entered land in the spring of 1857 and took a quarter section in Sibley county, and he has
33 remained in that county ever since. He became a citizen by taking up and owning public land. He took up surveyed land. He did not take it up as a homestead—there was no homestead law then—he took it up under a pre-emption. He paid with a land warrant for his land.

Redirect:

I was seven years old when I came to the United States. My father is still living and has patented land. My information is that he became a full citizen.

Mr. KINSLEY: The fact of citizenship is a matter of record and has to be proved like any other record, and we object to oral testimony to prove the fact.

COURT: I am inclined to think, from the authorities which have been cited, that the fact of citizenship must be proved from the record.

Judge MCCONNELL: If there is any doubt as to the citizenship of the defendant I propose to have him made a citizen right here during the progress of the trial.

Whereupon, after satisfactory evidence regarding the character of the said Moses Manuel being offered and the court being satisfied that he was a fit and proper person, he took the oath of
34 renunciation and allegiance, and was thereupon made a citizen of the United States.

MOSES MANUEL continued:

My father came to the country first in 1852. He lived here four years, from 1852 to 1856. In 1856 he went back to get his family. My father lived in the town of Henderson, Sibley county, Minnesota; he has lived there ever since. As I remember it, in the year 1863 the court-house was burned and destroyed, and the records of the district court, tax books, court books, and everything was destroyed; all the records were destroyed.

Recross-examination:

My father came here in 1856 with the family; he was four years in the United States before that. When he decided to come here and live he came back and sold his place and then moved to Minnesota. I was not with him in 1852, and do not know if he decided to come; he came back and sold his place and moved out. I was born in 1846, I believe. I was six years old when my father first went away, but I remember what he did. I do not know what he said he was going to do, but he sold his place and moved out. The Sibley
35 county court-house and records were destroyed in 1863. I was living in the same county, close by, at the time. I did not pay any attention as to how old I was at the time; I was somewhere about 13 or 14, maybe 15. I was not at the fire; I did not see it burn; I was there after it was burned. I know that the records were burned from the disturbance there was about the tax business, from what the people said, and what occurred there about hunting tax receipts. All the records were burned; they claimed everything. I did not see them burn; they were all burned—what everybody says. I have been in the Sibley county court-house since the fire looking for records myself. I never saw the old records; I never inquired for them personally. Mr. Wilcox was the clerk of the court at the time of the fire; I do not know his initials; he was clerk of the court as long as I can remember; I cannot say how long I can remember. He is not living now; he died some 3 or 4 years ago. I do not know the present clerk of the court. I have not been to that court-house within the past 15 years to inquire for any of the records whatever. All I know about the records being burned is what the neighbors told me; everybody talked about it, it being all burned.

Judge WADE, attorney for plaintiff: I move to strike out
36 the testimony of the defendant, Moses Manuel, upon the ground that the testimony shows that the defendant at the time of the commencement of this action and at the time the pretended Marshall Ney claim was conveyed to him was an alien, not a citizen of the United States, and that he was not capable of receiving and holding or taking title to any mining claims within the Territory of Montana.

COURT to Judge McConnell: I would like to hear from you on the matter of citizenship.

Judge MCCONNELL: The testimony already before the court shows that the father of this defendant here has been living in the State

of Minnesota ever since he came back there in 1856, and that he has made an entry under the pre-emption laws and patented land from the Government of the United States.

In addition to that we now offer the record of the filing of his first papers in 1856, and also that he is now a citizen of the United States, having been sworn in this morning.

The record of the taking out of the first papers of the defendant's father is as follows:

37 Mr. KINSLEY: I object to the introduction of this, for the reason that it purports to be a copy of a paper filed in the Department of the Interior, General Land Office, D. C., and purports to bear a copy of a certain signature and a copy of the seal of the district court of Sibley county, Minnesota, and the only original paper here is the certificate of S. M. Stockslager, Commissioner of the General Land Office, that a paper of this description is filed in his office. We think that the proper place from which to get a copy of this record would be from the clerk's office of the district court of Sibley county, Minnesota. There is nothing here to show that the clerk's office has been abolished; there is nothing here to show that the records have been destroyed, and this is simply a copy of a paper on file in the General Land Office, and for this reason we object to it. Further than that I would say that while this paper, if true, might give Peter Manuel, the alleged signer, certain rights, it does not make him a citizen of the United States nor make his minor sons citizens by virtue of that act.

Judge MCCONNELL to Moses Manuel: This Peter Manuel mentioned in this paper is your father?

A. Yes, sir.

38 COURT: Let the paper be admitted for whatever it is worth. I still hold that the defendant has not shown that he was a citizen of the United States at the time alleged in the pleadings on which issue has been made.

Record.

"B. 47027."

R. W. R.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 17, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed exemplification of the copy of the declaration of intention to become a citizen of the United States made by Peter Manualle and filed in the office with warrant No. 91735, for 160 acres, act of 1855, is true and literal exemplification of said copy.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year first above written.

[SEAL.]

S. M. STOCKSLAGER,
Commissioner of General Land Office.

I, Peter Manually, do declare upon oath that it is *bona fide*
39 my intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to all and any foreign prince, potentate, state, and sovereignty whatever, and particularly to Victoria, Queen of the United Kingdom of Great Britain and Ireland, of whom I have heretofore been a subject, so help me God; and I do further swear to support the Constitution of the United States and the organic act to establish the territorial government of Minnesota.

PETER MANUALLE.
(Signed with his mark.)

Subscribed and sworn to before me this 13th day of March, A. D. 1857.

THO. RUSSELL,
Deputy District Clerk, Sibley County, Minnesota Territory.

TERRITORY OF MINNESOTA, }
County of Sibley. }

I hereby certify that the foregoing is a true copy of the oath of Peter Manualle to become a citizen as it appears from record in my office, at Henderson, Sibley county.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States district court this 13th day of March, 1857.

THO. RUSSELL,
[SEAL OF COURT.] *Deputy District Clerk.*

40 COURT: I think a motion to nonsuit defendant, so far as the counter-claim is concerned, should be made.

Whereupon such motion was made and by the court sustained; to which ruling of the court in sustaining the motion of the plaintiff to nonsuit the defendant, the defendant then and there took exceptions.

Fred. Manuel.

FRED. MANUEL was then called by the defendant and examined touching his citizenship as follows, to wit:

Examined by Judge MCCONNELL:

I am a citizen of the United States. I became a full citizen last spring—the spring of 1888. I was born in Canada.

Cross-examined by Mr. KINSLEY:

It was understood when I served in the war three years I did not want my first papers.

COURT: We have a special statute governing soldiers.

WITNESS: The first of October, 1887, I think, the declaration was filed.

COURT: You said something about serving in the war.

WITNESS: I served in the rebellion during the late war three years. I was discharged in 1865. I was in Company I,
41 10 Minnesota volunteers. I have an honorable discharge. My discharge got burned about twenty years ago in a cabin up in this country; the cabin burned up and burned all the papers I had.

Mr. KINSLEY: We wish to introduce the record of this court, which shows that he took the oath of allegiance on April 29th, 1888, which were his final papers.

Judge McCONNELL: If your honor please, I move that the plaintiff be nonsuited, for the reason that the title to the property in dispute, as contended for by the plaintiff, comes to him from this witness by deed of 30th of November, 1887, when he was not made a citizen of the United States until April 29th, 1888, and at the time when the conveyance was made to him of the property in controversy he was an alien and incapable of holding land. The only effect his being a soldier was is to shorten the time of his residence, and also to dispense with the necessity of filing his declaration of intention to become a citizen of the United States.

Said motion of defendant to nonsuit the plaintiff was overruled by the court; to which ruling of the court the defendant then and there took exceptions; thereupon the court rendered judg
42 ment in favor of the plaintiff for the Columbia Lode as described in his complaint, to which the defendant excepted at the time.

Specification of Particulars in which the Evidence was Insufficient to Sustain the Verdict.

The evidence was insufficient to sustain the decision in this, to wit: It shows that Fred. Manuel was an alien at the time he received title from Pflaume and conveyed it to the plaintiff.

Errors of Law.

1. The court erred in rendering judgment for the plaintiff because the proof showed that Fred. Manuel was an alien when he received the title from Pflaume and when he conveyed it to the plaintiff, and any possessory right which Pflaume may have had by virtue of his location of the Columbia lode was forfeited to the Government.

Endorsed: Filed July 2nd, 1889. W. F. Parker, clerk. (Sig.) McConnell, Carter & Clayberg, att'ys for def't.

The foregoing statement is allowed and settled this 25th day of October, A. D. 1889.

(Sig.) HENRY N. BLAKE, *Judge.*

43 The following order was made and entered in the said action on the 25th day of October, A. D. 1889, by the judge

at chambers, overruling defendant's motion for a new trial, as follows, to wit:

In the District Court of the First Judicial District of Montana Territory in and for the County of Lewis and Clarke.

IVER WULFF, Plaintiff,
vs.
MOSES MANUEL, Defendant.

The motion for a new trial in the above-entitled action was this day submitted and overruled.

Dated at chambers October 25th, 1889.

(Sig.) HENRY N. BLAKE, *Judge*.

The following are the errors at law committed by the trial judge upon the trial of said cause and excepted to by the defendant:

1. The court erred in refusing to sustain the motion of the defendant to nonsuit the plaintiff.

2. The court erred in rendering judgment for the plaintiff
44 because the proof showed that Fred. Manuel was an alien when he received the title from Pflaume and when he conveyed it to the plaintiff.

3. The court erred in nonsuiting the defendant, Moses Manuel, because he was not a citizen of the United States at the time of filing his answer and cross-complaint. The Marshall Ney lode having been located by a citizen of the United States and sold and conveyed to defendants, such conveyance was good until office found.

4. The court erred in holding that the defendant, who was made a citizen before judgment of nonsuit, was not entitled thereafter to a status in court and judgment upon the merits.

Endorsed: Filed Nov'r 14th, 1889. John Bean, cl'k, by J. F. Wilson, d'p'y.

The foregoing statement, together with amendments offered by Messrs. Wade, Toole and Wallace and J. W. Kinsley, attorneys for plaintiff, is allowed and settled this 24th December, A. D. 1889.

W. H. HUNT, *Judge*.

45 (Title of Court.) (Title of Cause.)

Now comes the plaintiff and moves the court to allow the following amendments to defendant's and appellant's statement on appeal:

First. Amend said statement by adding after the word "trial," in the ninth line on page 16, the words:

"Under the following circumstances and conditions defendant and appellant filed herein, on the 2nd day of July, 1889, a paper endorsed and entitled 'Statement on motion for a new trial,' which paper does not bear thereon any evidence of service of any copy of statement on motion for new trial nor notice thereof, either upon the plaintiff or upon his attorney or either of them, nor was there

then nor is there now endorsed thereon any acceptance of service of said statement or a copy thereof or of any notice thereof."

On the 22nd day of July the plaintiff herein filed the following motion:

(Here insert motion.) P. 30.

And on said day filed herein the following notice of the filing of the above motion:

(Here insert copy of notice.) 31.

That while said motion was pending, and without any no-
46 tice to plaintiff or to his attorney, and in the absence of all of them, defendant's counsel, at chambers and in vacation, filed herein as a reply to said notice the affidavit of N. W. McConnell.

(Here insert affidavit.) 32.

And under the foregoing circumstances, and without five days' or any notice of any kind or character to plaintiff or his attorneys, and in the absence of both and all of them, the attorney for defendant alone being present and at chambers and in vacation, there being no regular term of said court open or in session, the judge of said court, at the request of defendant's counsel, undertook to settle a statement on the motion for a new trial and did, on the 25th day of October, A. D. 1889, under the circumstances last aforesaid, settle said statement and hear and dispose of said motion for a new trial, and the order appealed from is the order so made at the aforesaid hearing.

Second. Amend the said statement by inserting after the word "judge," in the 18th line, on the 12th page thereof, the words "which motion was heard in vacation at chambers and without any notice thereof or of the hearing thereof to the plaintiff or to his attorneys or to either of them and in the absence of both and all of them."

(Sig.) J. W. KINSLEY AND
WADE, TOOLE AND WALLACE,
Plaintiff's Attorneys.

Helena, December 6th, 1889.

Foregoing amendments allowed.

W. H. HUNT, *Judge.*

47 *Motion Referred to in Pff's Amendments to Statement.*

(Title of Court.) (Title of Cause.)

Now comes the plaintiff, Iver Wulff, by his attorneys, and moves the court to strike from the files in the above-entitled action the so-called statement on motion for new trial and the paper so designated therein, filed on the 2nd day of July, A. D. 1889, for that there is no proof of a service of a copy thereof upon the plaintiff or his attorney-, and for that there never was any service of a copy thereof upon the

plaintiff or his attorneys or any waiver thereof or acceptance thereof or any service or waiver of acceptance of service by plaintiff or his attorneys of any notice of the filing of the same.

WADE, TOOLE AND WALLACE,
Attorneys for Plaintiff.

Notice of Motion Referred to in Plaintiff's Amendments to Statement on Appeal.

(Title of Court.) (Title of Cause.)

To Messrs. McConnell, Carter and Clayberg, attorneys for defendant:

You will please take notice of plaintiff's motion to strike from the files the so-called statement on motion for new trial therein filed on the 2nd day of July, 1889.

48 WADE, TOOLE AND WALLACE,
Attorneys for Plaintiff.

Service of the foregoing motion accepted this 22nd day of July, 1889.

McCONNELL, CARTER & CLAYBERG,
Attorneys for Defendant.

Affidavit of N. W. McConnell, Referred to in Plaintiff's Amendments to Statement on Appeal.

(Title of Court.) (Title of Cause.)

Motion to strike the statement of the case, on motion for a new trial, from the files.

In this case comes N. W. McConnell and on oath says that he is one of the attorneys for defendant in the above-entitled cause; that on the 29th day of June, A. D. 1889, he served upon Wade, Toole & Wallace, counsel for the plaintiff, the statement of the case on motion for a new trial by leaving the original thereof with the Hon. D. S. Wade, one of the members of said firm, and he also verily believes that he also left a copy with him at the same time. He further states, that he prepared a copy for this purpose and took it with him to the office of said Wade, Toole and Wallace and had it upon the desk of said D. S. Wade, and his recollection is that he said to him, pointing to the copy, "That is for you." Affi-
49 ant further states that he has made diligent search in his office for the said copy, but that he has not been able to find it; that he left the original with said Wade, he agreeing to see his associate counsel, J. W. Kinsley, and see if they could agree to it as correct; that on a subsequent day, having called said Wade to the telephone and asked him whether the agreement had been made, he replied that it had, but that he had given the statement to his associate counsel, Mr. Kinsley; that on a subsequent day, having called upon Mr. Kinsley and asked him if he had agreed to said statement, he replied that Judge Wade and himself had consulted in regard to

it and had concluded that it was necessary that they should have enough proof in the statement to make out a *prima facie* case for their client; that having told him that this was not necessary, still he was willing that they should insert it by way of amendment, if they so desired, as he had no objections to it, his only contention being an error of law arising upon the construction given by the court to the rights of aliens.

Affiant further states that on the 2nd day of July J. W. Kinsley, one of the counsel of the plaintiff, called upon affiant at his office and informed him that they should take ten days within
50 which to file the amendment, the time required by the statute; that on the same day, having called at the office of said counsel, when he proposed to stipulate that said statement should be filed as of the 29th day of June, the day upon which it was originally served upon said Wade, so that the time should begin to run from that day, they having stated that he would take the statement and file it with the clerk as of that day, that they would have their full ten days thereafter in which to file their amendment; that thereupon said Kinsley gave said statement to affiant, and he took it immediately to the clerk and filed it.

N. W. McCONNELL.

Subscribed and sworn to before me this 26th day of July, A. D. 1889.

GEORGE O. FREEMAN,
Notary Public, Lewis & Clarke County, Montana Territory.

Endorsed: Filed Jul- 26th, 1889. W. F. Parker, clerk.

(Title of Court.) (Title of Cause.)

Motion for new trial in the above-entitled action was this day submitted and overruled.

Dated at chambers this 25th day of October, 1889.

HENRY N. BLAKE, *Judge.*

51 (Title of Court.) (Title of Cause.)

To Moss, Wade, Toole and Wallace and J. W. Kinsley, attorneys for plaintiff, and to John Bean, clerk of the district court:

You will please take notice that the above-named defendant hereby appeals to the supreme court of the State of Montana from an order of the court made and entered in the above-entitled action on the 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, sustaining the plaintiff's motion for a nonsuit, and from the further order of said court, made and entered in said action on the said 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, refusing to grant defendant's motion for a nonsuit, and from the judgment of said court, made and entered in said action on the 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, declaring the plaintiff to be the owner and entitled to the possession of the Columbia Quartz Lode

mining claim, in unorganized mining district, Deer Lodge county, Montana, and declaring that the defendant's right, title, and interest in and to the Marshall Ney Quartz Lode mining claim, in said unorganized mining district, Deer Lodge county, Mon-
52 tana, to be null and void and unavailing as against the right and title of the plaintiff, and for costs of suit, and from the further order of said court, made and entered in said action on the 25th day of October, A. D. 1889, in favor of the plaintiff and against the defendant, overruling the defendant's motion for a new trial in said action, and from the whole of said orders and judgments.

McCONNELL & CLAYBERG,
Attorneys for Defendant.

Service of a copy of the foregoing notice accepted this 24th day of December, A. D. 1889.

J. W. KINSLEY,
WADE, TOOLE AND WALLACE,
Attorneys for Plaintiffs.
JOHN BEAN, *Clerk of said Dist. Court.*

(Title of Court.) (Title of Cause.)

Whereas the above-named defendant has this day appealed the supreme court of the State of Montana from an order of the court made and entered in the above-entitled action on the 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, sustaining plaintiff's motion for a nonsuit, and from the further order of said court made and entered in said action on the
53 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, overruling the plaintiff's motion for a nonsuit, and from the judgment of said court made and entered in said action on the 28th day of May, A. D. 1889, in favor of the plaintiff and against the defendant, declaring the plaintiff to be the owner and to be entitled to the possession of the Columbia Quartz Lode mining claim in unorganized mining district, Deer Lodge county, Montana, and declaring that the defendant's right, title, and interest in and to the Marshall Ney Quartz Lode mining claim in said district, county, and State to be null and void and unavailing as against the right and title of the plaintiff and for costs of suit, and from the further order of said court made and entered in said action on the 25th day of October, A. D. 1889, overruling defendant's motion for a new trial in said action, and from the whole of said orders and judgments:

Now, therefore, we, the undersigned residents of Lewis and Clarke county, State of Montana, in consideration of the premises and of such appeal, hereby jointly and severally undertake and promise on the part of the defendant that the said defendant will pay unto the said plaintiff all damages and costs not exceeding three
54 hundred dollars which the said plaintiff may sustain by reason of such appeal or upon a dismissal thereof, and that the defendant will prosecute such appeal to effect; to which said

sum of three hundred dollars we acknowledge ourselves to be jointly and severally bound.

In witness whereof we have hereunto set our hands and seals this 24th day of December, A. D. 1889.

MOSES MANUEL. [SEAL.]
AARON HERSHFIELD. [SEAL.]
W. C. WHIPPS. [SEAL.]

In presence of—
GEORGE O. FREEMAN.

STATE OF MONTANA, } ss:
Lewis and Clarke County, }

Aaron Hershfield and W. C. Whipps, the sureties, whose names are subscribed to the foregoing instrument, being severally duly sworn, each for himself says that he is a resident and householder of the county of Lewis & Clarke, and that he is worth the sum specified in said undertaking as the penalty thereof over and above his just debts and liabilities, exclusive of property exempt from execution by law.

AARON HERSHFIELD.
W. C. WHIPPS.

Subscribed and sworn to before me this 24th day of December, A. D. 1889.

GEORGE O. FREEMAN,
Notary Public, Lewis and Clarke County, Montana.

55 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

IVER WULFF, Plaintiff and Respondent, }
vs.
MOSES MANUEL, Defendant & Appellant. }

I, John Bean, clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, do hereby certify that I have compared the foregoing transcript on appeal with the original papers in the above-entitled action now on file in my office, and that the said transcript is a full, true, and correct copy of the same.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 30th day of December, A. D. 1889.

[SEAL.] JOHN BEAN,
Clerk of said Court.

56 *Proceedings in Supreme Court.*

Order of court.

This cause was set for hearing on Saturday, January 18th, 1890. Messrs. Kinsley & Wade, Toole and Wallace, attorneys for respondents, gave notice that they would file a motion in this cause to strike out a portion of the record; which said motion the court ordered to be filed on this day (January 15th, 1890).

57 *Motion to Strike from Transcript.*

In the Supreme Court of the State of Montana, January Term, 1890.

IVER WULFF, Plaintiff and Respondent,
vs.
MOSES MANUEL, Defendant & Appellant.

Now comes the respondent and plaintiff in the above-entitled action, and moves the court to strike from the transcript now on file in said court in said cause all that portion thereof between pages 16 & 33, inclusive, for the reason:

First. That it does not appear that the so-called statement between pages 16 & 27, inclusive, was ever regularly settled, served, or reduced to a statement of motion for a new trial in the manner provided by law, but, on the contrary, it does appear from transcript on pages 28 & 29 that the same never became a statement upon motion for a new trial so that it could be considered upon such motion.

Second. For the reason that the so-called statement was merely a statement prepared by the appellant and filed without any service of a copy of the statement or notice thereof as required by law.

58 Third. For the reason that said statement was settled by the court in the absence of the plaintiff and his attorneys and without any notice of its settlement of any kind or character to *him* or either of them, as appears from page 29 of the transcript.

Fourth. For the reason that said motion for a new trial was heard and disposed of in the absence of plaintiff and his attorneys and without any notice of any kind or character to them or either of them of the time and place of its hearing.

Fifth. For the reason that said so-called statement on appeal commencing at page 16 and ending page 33 of the transcript is not a statement in conformity with the rules of this court, in that it is not an engrossed statement, the amendments allowed not being incorporated in the statement itself, but appearing separately on pages 27 to 33, inclusive.

J. W. KINSLEY,
WADE, TOOLE & WALLACE,
Attorneys for Plaintiff and Respt.

Endorsed: Filed January 15th, 1890. W. J. Kennedy, clerk supreme court.

59 JANUARY 18TH, 1890.

This cause came on this day to be heard on respondent's motion to strike out a portion of record, whereupon, by agreement of counsel, it is ordered that the hearing on this motion be postponed until Tuesday, January 21st, 1890, at 10 o'clock a. m.

60 *Submission of Motion to Strike Out.*

This cause came on this day to be heard on the respondent's motion to strike out a part of the record. Appellant files his brief of points and authorities bearing upon the motion. Arguments are submitted by counsel, and the motion is taken under advisement by the court.

Chief Justice Blake did not sit in this hearing.

Judgment of Court on Motion to Strike Out.

This cause came on this day to be heard on the "respondent's motion to strike out a portion of the record." Whereupon on consideration it is hereby ordered by the court that the motion to strike out parts of the transcript be denied.

The opinion of the court was delivered by De Witt, W. H., Harwood, E. N., concurring.

Blake, ch. justice, did not sit in this case.

(The opinion on motion to strike out is as follows, to wit:)

This case is before us on the respondent's motion to strike from the transcript the statement on appeal. The statement on appeal contains as a portion thereof a statement on motion for a new trial.

It is at the latter statement, as it appears in the former, that
61 the motion is particularly directed. The judgment below was for plaintiff. Defendant made a motion for a new trial. The motion was denied. Defendant appeals. A statement on motion for a new trial appears to have been settled by the district judge. In the statement on appeal appears the respondent's objections to the former statement, which objections he urges as follows: First, that the statement on motion for new trial does not bear thereon any evidence of service of any copy of any statement on motion for new trial, nor notice thereof, either upon the plaintiff or his attorney, nor is there indorsed thereon any acceptance of service of the statement, copy, or notice. We hold that this objection is not well founded. The statement was settled by the judge October 25th, 1889. On that day it appears that there was before the judge, on file in the case, an affidavit of N. W. McConnell, one of appellant's attorneys, dated July 26th, 1889, which sets forth in detail that on June 29th, 1889, he served upon D. S. Wade, one of respondent's attorneys, the statement by then leaving the original with him; that July 2 one of respondent's attorneys returned the statement to affiant, who then filed it with the clerk of the court. This was a good service. The law provides that the moving party must prepare a draft of the statement and serve the same or a copy thereof upon the adverse party. Subdiv., third sec., 298, Code
62 Civil Procedure. The proof of such service was equally good. It is naturally made by the evidence of the person serving the paper. Such proof was made by a lengthy affidavit of such person and was before the judge on making the settlement. An ac-

ceptance of service endorsed upon a paper relieves the party wishing to prove the fact from so doing. It would be a monstrous practice if the party on whom service were made could refuse or neglect to admit service in writing on the paper and then claim that no service could be made to appear by evidence. Second, the respondent objects that the statement on motion for a new trial was settled by the court in the absence of the plaintiff and his attorneys, and without any notice of its settlement to either of them.

The statute is clear upon this subject. The respondent was not entitled to any notice of the settlement for the reason that he had filed no amendments to the proposed statement. "If no amendments are served within the time designated the proposed statement may be presented to the judge for settlement without notice to the adverse party." Section of Code Civ. Proc. *supra*. Third, respondent complains that the motion for a new trial was heard and disposed of in the absence of plaintiff and his attorneys and without
63 notice to them. This seems to be the fact; but the respondent cannot complain. The disposition of the motion was in his favor—that is, it was denied. It does not appear that the respondent was injured by the action of the court in sustaining the judgment theretofore rendered in his favor. If his absence had any effect, it seems to have redounded to his advantage. He cannot complain of this. Fourth, the respondent further complains that the statement on motion for a new trial was settled and allowed when there was pending and undisposed of what he calls a motion to strike the statement from the files. On July 22 respondent filed the following:

"Now comes the plaintiff, etc., and moves the plaintiff to strike from the files in the above-entitled action the so-called statement on motion for a new trial, and the paper so designated therein filed, etc., for that there is no proof of a service of a copy thereof upon the plaintiff or his attorney, and for that there never was any service of a copy thereof upon plaintiff or his attorneys or any waiver thereof or acceptance thereof or any service or waiver of acceptance of service by plaintiff or his attorneys on any notice filing of the same."

Signed by plaintiff's attorneys.

Also on the same day the following:

To Messrs. McConnell, Carter & Clayberg, att'ys for def't:

64 You will please take notice of plaintiff's motion to strike from the files the so-called statement on motion for new trial filed therein on the 2nd day of July, 1889."

Signed by plaintiff's attorneys. Service admitted by def't's attorneys.

There was filed with the above nothing whatever in support of the recitals therein. It must be presumed that plaintiff relied upon the record. Without passing upon whether the above papers constituted a motion under the provisions of secs. 182, 183, & 184, Code Civ. Proc., it is sufficient here to say that the alleged want of proof of

service of statement was amply supplied by the McConnell affidavit July 26th, which was on file three months before the settlement of the statement, was before the judge on such settlement, and was uncontroverted by any evidence whatever. This matter we have disposed of — paragraph "first," *supra*.

Fifth. Respondent also objects to the form of the statement on appeal that it is not engrossed and the matters not in chronological order. The only offense in this respect is that the amendments are placed together at the end of the statement. Such may be the chronological order in which events occurred.

65 The arrangement is inartistic and awkward, but not a transgression of the rule, which we think justifies us in striking out the whole statement. It is our opinion that the motion should be denied, and it is so ordered.

WILLIAM H. DE WITT,
Associate Justice.

I concur.

E. N. HARWOOD,
Associate Justice.

Blake, C. J., did not sit in the case, having acted as district judge on the trial below.

Date of Hearing Cause.

The cause was then set down for hearing on January 29th, 1890, Wednesday, at 10 o'clock a. m.

Submission.

This cause, having been argued by counsel, is submitted and taken under advisement by the court.

Judgment.

FEBRUARY 4TH, 1890.

This cause came on this day for the judgment and decision of the court on appeal; whereupon, on consideration, it is now here ordered, adjudged by the court that the judgment and decision of the court below, made and entered on the 28th day of May, A. D. 1889, be, and the same is hereby, affirmed.

A. J. Dewitt delivered the opinion of the court. Harwood, A. J., concurs.

66 (The opinion of the court is as follows:)

Supreme Court of Montana, January Term, 1890.

IVER WULFF, Respondent,
vs.
MOSES MANUEL, Appellant.

Opinion of the Court by De Witt, J.

This action is in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the

United States to determine the right of defendant to proceed in the United States land office for patent thereto.

On Nov. 18th, 1887, the defendant, Moses Manuel, made application in the land office for patent for the Marshall Ney mining claim.

The plaintiff, Ivur Wulff, filed his adverse claim to such application, basing his contest upon his right to the premises by virtue of their location and possession as the Columbia mining claim. Whereupon the parties were remanded to the court of competent jurisdiction (sec. 2326, R. S. U. S.) for the determination of their claims. The result was this action.

The plaintiff's location of the Columbia claim was made July 1, 1882, by Henry Pflaume, who was a citizen of the United States. November 30, 1885, Pflaume conveyed to Alfred Manuel. On Nov. 30th, 1887, Alfred Manuel conveyed to Ivur Wulff, the plaintiff.

Such is plaintiff's location and derailgnment of title of the Columbia lode. Defendant's title is as follows: His Marshall Ney claim was located March 15, 1885, by said Alfred Manuel, "who," in the language of defendant's answer, "was then and now is a citizen of the United States." (See cross-complaint in answer, paragraph 2.)

67 This allegation is undenied, and, therefore, for the purposes of this action will be taken as true. In October, 1885, Alfred Manuel conveyed to Moses Manuel, the defendant.

It is conceded by counsel on the argument that Moses Manuel was an alien until the 28th day of May, 1889, when he was made a citizen during the progress of the trial, being entitled thereto without a preliminary declaration for reasons unnecessary here to recite. The respective claims described are in conflict as to their area. No questions are presented as to due location or annual representation or compliance with mining laws, rules, or regulations or sufficiency of the conveyances. The court below nonsuited the defendant upon his cross-complaint for the reason that at the time when the Marshall Ney claim was conveyed to defendant and when he made his application to the United States for a patent and the action was commenced he was an alien.

The court further refused to nonsuit the plaintiff, the defendant moving for such nonsuit on the ground that Alfred Manuel was an alien when he received title from Pflaume and transferred the same to plaintiff. Judgment was rendered for plaintiff for the possession of the premises. A motion for a new trial was made and denied. The defendant appeals from the order denying the new trial and from the judgment as well. Appellant relies upon two errors, which we will consider in the inverse order of their presentation:

1. The court erred in refusing to nonsuit the plaintiff.

The sole ground of the motion was that Alfred Manuel, who was a link in the chain of plaintiff's title from Nov. 30, 1885, to Nov. 30, 1877, was during that whole period an alien, and as such not competent to receive and transmit the title. The pleadings deny to this court the discussion of that proposition, although counsel, in argument and brief, have devoted much time thereto.

68 The party making the motion, the defendant, has stated in his verified answer that said Fred. Manuel was a citizen of the United States ever since March 15, 1885. This was admitted by the replication. Plaintiff could not afterwards be heard to deny and stultify his pleading by moving for a nonsuit, by which motion he was obliged to declare the falsity of his own answer.

He was bound by the allegations of his answer, especially when the opposite party had accepted the truth thereof. The court, as well, had the right to accept such truth. Defendant's said motion for a nonsuit was properly denied. Mulford *v.* Estudillo, 32 Cal., 139; Harold *v.* Smith, 34 *id.*, 124.

2. The only other error assigned is the action of the court in nonsuiting the defendant upon his cross-complaint. Moses Manuel, the defendant, obtained his title, if at all, by purchase in October, 1885. He applied to the United States for patent Nov. 18, 1887.

The action was commenced Feb. 1, 1888. Defendant answered June 1, 1888. The cause was tried May 28, 1889. At all of these times the defendant was an alien, as admitted by counsel, and had not declared his intention to become a citizen of the United States. He became a citizen during the trial. This act defendant retroacted to all the previous events above recited. If this be the law he should not have been nonsuited. He should have been heard upon his claim that the right to the possession might have been declared to be in plaintiff or defendant or neither. 21 U. S. Stats. at Large, chap. 140. "That an alien may take by deed or devise and hold against any one but the sovereign until office found is a familiar principle of law, which requires no citation of authorities to establish." Appellant then cites us to a line of decisions upon the question of the retroaction of the act of naturalization. These
69 cases treat of land in its ordinary sense, and not of possessory rights to mining claims on the public domain. They all discuss grants between persons, and not the peculiar laws, rules, and regulations by which the sovereign power promises to sell its own lands to certain described persons.

These cases proceed upon the settled principle of law that an alien may take and hold land by grant until office found, and then they lay down the further rule that if the alien so holding become a citizen before office found that the act of naturalization in the cases before the courts retroacts to the original acquirement of title. The cases referred to are, Osterman *et al. vs.* Baldwin, 6 Wall., 122; Jackson *vs.* Beach, 1 Johns. Cases, 401; Craig *vs.* Bradford, Wheat., 594; Fairfax's Devisee *vs.* Hunter's Lessee, 7 Cranch, 607; Governeur *vs.* Robertson, 11 Wheat., 332.

But in the case at bar we encounter a class of real estate *sui generis*, viz., possessory rights to mining claims on the public domain of the United States whose rights are endowed with the qualities of real estate to a high degree. The land belongs to the United States; but the Government says that it will sell this class of its lands to citizens of the United States and to those who have declared their intention to become such, and to them only, and only to them when they have complied with certain laws of the United

States and local mining rules and regulations as to the location and possession of such claims. No other persons may apply to purchase from the United States. The mineral lands of the Government are not open to exploration, occupation, or purchase by aliens. An alien may not even take or hold real estate of this class any more than he may take or hold any real estate by descent. In descent it is the rule of law, and not the act of the party, that vests title in the heir. As to descent to an alien, the law says that it
70 would be an idle thing to vest title in the alien by one act of law and then take it from him by another, viz., office found. See Fairfax's Devisee *vs.* Bunter's Lessee, 7 Cr., 619.

So, in conferring title to mining claims and the possessory rights thereto, such title and possessory rights are given only to the class of persons designated by the law, and by virtue of that law, and in the manner prescribed thereby. It would, therefore, be incongruous to hold that an alien could take and hold until office found these claims by the provisions of the law which says that its benefits are extended only to citizens and those who have declared their intention to become such and, after he had so taken and held them, resort to office found to deprive him of them.

The parallel of the alien heir claiming by descent and the alien miner claiming under the mining laws seems to be complete as to the principle on due consideration. To the alien is given no right to explore, purchase, or occupy mineral lands.

This being his situation as an alien, without even the right to take or hold until office found, as he may other real estate, then when he becomes a citizen there is nothing, no previous taking or holding or the right thereto, to which his subsequent naturalization can retroact. We are, therefore, of opinion that Moses Manuel, as an alien when the action was commenced and when the title came to him as he claims, could not be heard in court to assert his claim to the possessory right to the mining claim in controversy, and that his subsequent naturalization could not retroact, as he urges. As to the proposition last discussed, see Tibbetts *vs.* Ah Tong, 1 Mont., 536.

Respondent has presented some objections to the record on the appeal. The views above expressed render a consideration of those objections unnecessary.

71 The order of the district court denying the new trial and also the judgment are affirmed.

WILLIAM H. DE WITT,
Associate Justice.

I concur.

E. N. HARWOOD,
Associate Justice.

Blake, C. J., was trial judge in the lower court, and did not sit in the case on appeal.

72 FEBRUARY 6TH, 1890.

Now, on this day, comes McConnell & Clayberg, counsel for the appellant in this cause, and presents and files a motion and petition for a rehearing; which said motion & petition are taken under advisement by the court.

Said motion and petition being in words and figures as follows, to wit:

73 *Motion of Appellant for Rehearing.*

In the Supreme Court of Montana.

IVER WULFF, Plaintiff and Respondent,)
vs.
MOSES MANUEL, Defendant & Appellant.)

Now comes the above appellant, by McConnell & Clayberg, his counsel, and moves the court for a rehearing in the above-entitled cause, and for ground of such rehearing refers to his petition filed herein.

Dated Feb'y 5th, 1890.

McCONNELL & CLAYBERG,
Attorneys for Appellant.

(Endorsed:) Filed Feb'y 6th, 1890. W. J. Kennedy, clerk supreme court.

74 *Petition for Rehearing.*

In the Supreme Court, State of Montana.

IVER WULFF, Plaintiff & Respondent,)
vs.
MOSES MANUEL, Def't & Appellant.)

To the honorable supreme court of Montana:

Your petitioner, Moses Manuel, the appellant, respectfully asks the honorable court for a rehearing in the above cause upon the ground that one branch of the case, to wit, that in which the action of the court below was affirmed in refusing to nonsuit the plaintiff upon your petitioner's motion, was based upon a misconception of the facts of the case as disclosed by the record.

The following are extracts from the opinion of the court delivered in this case on the fourth inst.:

"The plaintiff's location of the Columbia claim was made July 1st, 1882, by Henry Pflaume, who was a citizen of the United States. November 30th, 1885, Pflaume conveyed to Alfred Manuel. On November 30th, 1887, Alfred Manuel conveyed to Iver Wulff, the plaintiff." Such is plaintiff's location and deraignment of
75 title of the Columbia claim. Defendant's title is as follows:

"The Marshall Ney claim was located March 15th, 1885, by said Alfred Manuel, who, in the language of the defendant's answer,

'was then and now is a citizen of the United States.' (See cross-complaint in answer, paragraph 2.) This allegation is undenied and therefore, for the purpose of this action, will be taken as true. In October, 1885, Alfred Manuel conveyed to Moses Manuel, the defendant,"

It is conceded by counsel on the argument that Moses Manuel was an alien until the 28th day of May, A. D. 1889, when he was made a citizen during the progress of the trial, being entitled thereto without a preliminary declaration, for reasons here unnecessary to recite (page 3 of opinion).' "The court erred in refusing to nonsuit the plaintiff. The sole ground of the motion was that Alfred Manuel, who was a link in the chain of plaintiff's title from Nov'r 30th, 1885, to Nov. 30th, 1887, was during that whole period an alien, and, as such, was incompetent to receive and transmit title. The pleadings deny to this court the discussion of that proposition, although counsel in argument and brief devoted much time thereto.

The party making the motion, the defendant, has stated in
76 his verified answer that said Fred. Manuel was a citizen of the United States ever since March 15th, 1885. This was admitted by the replication. Plaintiff could not afterwards be heard to deny and stultify his pleading by moving for a nonsuit, by which motion he was obliged to declare the falsity of his own answer. He was bound by his answer, especially when the opposite party had accepted the truth thereof. The court, as well, had the right to accept such truth. Defendant's said motion for a nonsuit was properly denied" (page 5). "An alien may not even take or hold real estate of this class any more than he may take or hold any real estate by descent. In descent it is the rule of law and not the act of the party that vests title in the heir. As to descent to an alien the law says it would be an idle thing to vest title in the alien by one act of the law, then take it from him by another, namely, office found. So, in conferring title to mining claims and the possessory rights thereof, such title and possessory rights are given only to the class of persons designated by the law and by virtue of that law and in the manner prescribed thereby. It would therefore be incongruous to hold that an alien could take and hold until office found those claims by the provisions of the law which says that
77 its benefits are extended only to citizens and those who have declared their intentions to become such, and after he had so taken and held them resort to office found to deprive him of them. To the alien is given no right to explore, purchase, or occupy mineral lands. This being his situation as an alien, without even the right to take and hold until office found, as he may other real estate, then, when he becomes a citizen, there is nothing taking or holding or the right thereto to which his subsequent naturalization can retroact." It will be seen by the court that the learned associate justice who delivered the opinion confounded the identity of Alfred Manuel & Fred. Manuel, taking them to be one and the same person, when they are two different persons, Alfred Manuel being a citizen, native born, of the United States and Fred. Manuel being an alien. The honorable court was mistaken in find-

ing that the plaintiff, Iver Wulff, deraigned title through Alfred Manuel, a citizen. His title was deraigned as follows, to wit:

Location by Henry Pfaume, who was a citizen, in 1882; conveyance by him to Fred. Manuel in 1885, who was then an alien, and conveyance by Fred. Manuel to the plaintiff, Wulff, in 1887.

Petitioner does not ask a rehearing as to that portion of the decision which affirms the action of the court below in non-
78 suiting him upon his cross-complaint, but he insists that the very principle decided by the court upon that question must logically and inevitably result in nonsuiting the plaintiff. Petitioner respectfully suggests that he did not stultify his pleadings when he moved for such nonsuit, for in his pleadings he averred Alfred Manuel to be a citizen, which is true, but nowhere does he aver that Fred. Manuel was a citizen. But the plaintiff, in endeavoring to deraign his title, having deraigned through said Fred. Manuel, who was an alien and who thereby, according to the decision in this case and in Tibbetts *vs.* Ah Tong, could not purchase, failed utterly in deraigning any title, and therefore should have been nonsuited. In that event the court should have declared that the mineral claim in controversy belonged to neither the appellant nor the respondent, but was a part and portion of the public domain of the United States.

Respectfully submitted.

MOSES MANUEL,
By McCONNELL AND CLAYBERG, *Attorneys.*

(Endorsed:) Filed Feb'y 6th, 1890. W. J. Kennedy, clerk supreme court.

79 *Motion for Rehearing Granted.*

Resubmission on motion for rehearing.

This cause came on this day for the judgment and decision of the court on the appellant's motion for rehearing; which said motion was granted. Arguments were then submitted by counsel on rehearing. The cause was resubmitted and taken under advisement by the court.

Judgment on Rehearing.

This cause came on this day for the judgment and decision of the court on rehearing; whereupon on consideration it is ordered, adjudged, and decreed by this court that the order and judgment of the district court made and entered in this cause on the 28th day of May, 1889, be, and the same is hereby, affirmed.

De Witt, W. H., A. J., delivered the opinion, Harwood, E. N., A. J., concurring.

Chief Justice Blake did not sit in this case.

(The opinion on rehearing is as follows, to wit:)

In the Supreme Court of Montana, January Term, 1890.

IVER WULFF, Respondent,
vs.
MOSES MANUEL, Appellant.

80 *Opinion of the Court on Rehearing by De Witt, J.*

A statement of this case appears fully in the opinion on the original hearing and will not be repeated. We now learn that we fell into an error of fact, for which the rehearing was granted. In the record appear the names Alfred Manuel and Fred. Manuel. The similarity of the names and the fact that Fred. is an ordinary abbreviation for Alfred led us to believe that these names represented one person, and that he was called indifferently Alfred and Fred. Our attention is now called to the fact that Alfred was the locator of the Marshall Ney claim, and that Fred. was the person who appears as a link in the chain of plaintiff's title. With this new light it becomes necessary to add a word to our former opinion.

Appellant contends that Fred. Manuel was an alien during all the time that he purported to hold the title. He then takes the position, in his notice of motion for new trial and his specifications of error on the motion and on the appeal, that when title was attempted to be conveyed by the deed from Pflaume to Fred. Manuel a forfeiture took place and the land escheated to the United States.

81 We do not give any opinion whether the said attempted conveyance worked a forfeiture or not, but we will assume, for the sake of the argument, that the appellant's view of that conveyance is entirely correct, and that it had the effect that he claimed—that is to say, that it worked a forfeiture—and will decide the case on the theory that appellant advances.

A party relying upon a forfeiture by his adversary in these contests for the possessory rights to mining claims must specially plead such forfeiture, must set forth the facts constituting the same, and prove them on the trial.

The answer in the case denies the plaintiff's ownership, possession, and right of possession of the premises. It does not specially plead the forfeiture now claimed; it does not set forth the facts constituting the same; it does not inform the plaintiff that a forfeiture is to be urged or the nature of the acts or omissions working such forfeiture. If defendant intended to rely upon a forfeiture by plaintiff, he has not observed the rules of law governing that plea. He was properly not heard upon that plea on the court below, and cannot be so heard now. Dutch Flat Water Co. *vs.*

82 Mooney, 12 Cal., 534; Du Pratt *vs.* James, 61 *id.*, 361; Morenhaut *vs.* Wilson, 52 *id.*, 263; Renshaw *vs.* Switzer, 6 Mont., 464; Garfield Co. *vs.* Hammer, 6 *id.*, 53; Hopkins *vs.* Noyes, 4 Mont., 556.

The order and judgment of the district court are affirmed.

WILLIAM H. DE WITT,
Associate Justice.

I concur.

E. N. HARWOOD,
Associate Justice.

Blake, C. J., did not sit in the case.

83 The Supreme Court of the State of Montana.

IVER WULFF }
vs.
MOSES MANUEL. }

To the Honorable Henry N. Blake, chief justice of the supreme court of the State of Montana:

And now comes Moses Manuel, by McConnell & Clayberg, his attorneys, and complains that in the records and proceedings and also in the rendition of a judgment in a suit between Iver Wulff, plaintiff, and Moses Manuel, defendant, in the supreme court of the State of Montana, being the highest court of law or equity of the said State in which a decision could be had in such suit, and in which a final judgment was rendered against him on the 15th day of February, A. D. 1890, in said suit, wherein the construction of the naturalization laws & mineral land laws of the United States was drawn in question and the decision was against the rights specially set up under such naturalization laws and mineral land laws, all which appears in the records and proceedings in said suit, manifest
84 error hath happened, to the great damage of the said Moses Manuel.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

McCONNELL & CLAYBERG,
Attorneys for Moses Manuel.

Writ of error allowed.

HENRY N. BLAKE,
Chief Justice of the Supreme Court of the State of Montana.

85 APRIL 16TH, 1890.

Comes the appellant, by attorney, and presents to the clerk of this court a writ of error in said cause from the Supreme Court of the United States, filing therewith a copy of said writ, and files the following bond; which said bond has been *been* fixed at the sum of two thousand dollars by this court, and it is hereby approved and supersedeas granted:

(*Bond.*)

The Supreme Court of the United States.

MOSES MANUEL, Pl'ff in Error, }
vs.
IVER WULFF, Def't in Error. }

Know all men by these presents that we, Aaron Hershfield and Afusalem Davidson, are held and firmly bound unto Iver Wulff in the full and just sum of two thousand dollars, to be paid to the said Iver Wulff, his certain attorneys, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these
86 presents.

Sealed with our seals and dated this 16th day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a regular term of court, in a suit depending in the supreme — of the State of Montana, between Iver Wulff and Moses Manuel, judgment was rendered against the said Moses Manuel, and the said Moses Manuel having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued, directed to the said Iver Wulff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if this said Moses Manuel shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MOSES MANUEL. [L. S.]
AARON HERSHFIELD. [L. S.]
ANSALEM J. DAVIDSON. [L. S.]

Sealed and delivered in presence of—
G. O. FREEMAN.

87 UNITED STATES OF AMERICA, }
District of Montana, } *ss:*

Aaron Hershfield & Ansalem J. Davidson, being duly sworn, depose and say and each for himself saith that he is worth one thousand dollars over and above all just liabilities and exemptions.

AARON HERSHFIELD.
ANSALEM J. DAVIDSON.

Sworn to this 16th day of April, 1890, before me—
[SEAL.] GEORGE O. FREEMAN,
Notary Public in and for the County of Lewis and Clarke, State of Montana.

Approve the within bond & sureties thereto.
HENRY N. BLAKE,
Chief Justice of the Supreme Court of the State of Montana.

(Endorsed:) Filed April 16th, 1890. W. J. Kennedy, clerk supreme court.

88 STATE OF MONTANA:

In Supreme Court.

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing — pages contain a full, true, and complete transcript of the record and proceedings in said

court in the cause therein stated, save and except the briefs of counsel.

In testimony whereof I hereto set my hand as clerk and fix the seal of said court at my office, in the city of Helena, Montana, this 17th day of April, A. D. 1890.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of the State of Montana.

(Endorsed on cover:) No. 3. In Montana supreme court. January term, 1890. Iver Wulff, plaintiff and respondent, *vs.* Moses Manuel, defendant and appellant. Transcript on appeal. J. W. Kinsley & Wade, Toole, & Wallace, attorneys for plaintiff & respondent. McConnell & Clayberg, att'ys for def't & app't. (Filed Dec. 30th, 1890. W. J. Kennedy, clerk supreme court.)

Endorsed on cover: Case No. 14,206. Montana supreme court. No. 214. Moses Manuel, plaintiff in error, *vs.* Iver Wulff. Filed October 4, 1890.

NOV 23 1893
JAMES H. MCKENNEY

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

MOSES MANUEL,
PLAINTIFF IN ERROR,
VS.
IVER WULFF,

214

Brief and Argument of JOHN B. CLAYBERG, Counsel for Plaintiff in Error.

JOHN B. CLAYBERG,
Atty. for Plaintiff in Error.

C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

MOSES MANUEL,
PLAINTIFF IN ERROR,
VS.
IVER WULFF,

Brief and Argument of JOHN B. CLAYBERG, Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

On the 28th day of May, 1889, the above entitled cause came on for trial in the District Court of Lewis and Clarke County, Montana, before the Court, a jury being waived by the parties, when it appeared from the evidence that Henry Pflaume located the Columbia Lode mining claim in the year 1882; that on the 1st day of November, 1885, he conveyed said mining claim to Fred Manuel by deed; that on the 30th day of November, 1887, Fred Manuel conveyed the same property, by

deed, to the plaintiff below, Iver Wulff; that one Alfred Manuel located the same mining claim under the name of the "Marshall Ney," claiming that the Columbia lode location had been abandoned and forfeited for the reason that no representation work was done thereon during the years of 1883 and 1884. Said Alfred Manuel, on the 12th day of October, 1885, conveyed to Moses Manuel, plaintiff in error, a one-third interest in the Marshall Ney, and on the 15th of October, 1887, said Alfred Manuel conveyed to the said Moses Manuel the remaining two-thirds interest in the Marshall Ney lode by deed, duly executed and recorded. Henry Pflaume and Alfred Manuel were both citizens of the United States at the time of their respective locations.

Iver Wulff, the plaintiff below, claimed the ground in controversy by virtue of the location of Henry Pflaume, and "by subsequent sales and transfers" to him. The evidence discloses that these sales were made by Pflaume to one Fred Manuel, and by Fred Manuel to the plaintiff below.

The latter deed was executed on the 30th day of November, 1887; the deed of Pflaume to Fred Manuel, as we have seen, bears date the 1st of November, 1885. The title, then, of the plaintiff below, was in Fred Manuel for the period of twenty-five months. The plaintiff

in error, in his answer, denies that the plaintiff below "ever became the owner of said property (the Columbia "lode) or any part thereof, in any manner whatever."

The title of the plaintiff below was put in issue by the pleadings. The plaintiff in error charges in his counter-complaint that the Columbia lode location was forfeited by reason of the want of representation work during the years 1883 and 1884; said plaintiff in error claiming that the ground in controversy was unoccupied public domain at the time of the location of the Marshall Ney lode in March, 1885.

Wulff denies this in his replication, and thus a question of forfeiture was one of the issues of the case.

Upon the trial of the case it appeared that the plaintiff in error was born in Canada, and came to this country when he was about eight years old, with his father, who, he supposed, had been naturalized, and that thus he was a citizen of the United States; but the trial court, upon the hearing of the evidence, which appears in the transcript, decided that he was not a citizen, and of his own motion, suggested that a motion for a non-suit should be made, which was accordingly done and the counter-claim of the plaintiff in error was dismissed; and he was not permitted to complete his case.

At this stage of the trial plaintiff in error called Fred Manuel and proved by him that he was born in Canada and was not made a citizen of the United States until the year 1888; that he filed his declaration of intention to become a citizen on the 1st day of October, 1887. The trial court non-suited the plaintiff in error because he was not a citizen at the time that Alfred Manuel executed to him the deeds of conveyance of the Marshall Ney lode, and at the time that this suit was commenced, holding that under the law, as laid down in the case of Tibbitts vs. Ah Tong, 4 Montana, 536, that the attempt on the part of Alfred Manuel to convey to him the said mining claim operated as an abandonment of the said mining claim, for the reason that the said plaintiff in error being at the time an alien could not take title to a mining claim. After the court had thus non-suited the plaintiff in error upon his counter-claim, his counsel moved the court to non-suit the plaintiff below, for the reason that he had failed to deraign his title, by reason of the fact that Fred Manuel was an alien at the time that Pflaume had conveyed to him the Columbia lode in 1885. The counsel for plaintiff in error suggested to the trial court that if the attempt on the part of Alfred Manuel to covey to the plaintiff in error the Marshall Ney lode operated as an abandonment of the same, a like attempt on the part of Pflaume to convey to Fred Manuel, who was an

alien, the Columbia lode, would operate as an abandonment of that claim. There was no objection on the part of the plaintiff below to this motion being made.

The court overruled this motion, and without hearing further evidence, gave judgment in favor of the plaintiff below. The plaintiff in error was not permitted to show the failure to do representation work on the Columbia lode during the years 1883 and 1884, or rather, was not permitted to complete his testimony upon this issue.

Pending the development of the testimony as to the citizenship of the plaintiff in error in the trial court, and before the non-suit, his counsel, to remove any doubt as to his citizenship, caused him to be naturalized before the trial court, under the provisions of Sec. 2167, of the Revised Statutes of the U. S. After the question of his citizenship was removed by his naturalization, as above set forth, the court held that such naturalization did not retroact and make good and valid the conveyance to him of the Marshall Ney lode as above set forth.

I.

The plaintiff in error contends that the trial court and the Supreme Court of Montana, in affirming the judgment of the trial court, erred in non-suiting him.

He further contends that if such non-suit was proper, the trial court ought to have non-suited the plaintiff below as well, and adjudge the ground in controversy to belong to the United States, under the provisions of the Act of Congress of 1881.

The Supreme Court in affirming the judgment of the court below in non-suiting the plaintiff in error, based its judgment upon the following reasoning: "These "cases proceed upon the settled principle of law that an "alien may take and hold land by grant until office found, "and then lay down the further rule that if the alien so "holding become a citizen before office found, that the "act of naturalization in the cases before the courts re- "troacts to the original acquirement of title. The cases "referred to are: Osterman et al., vs. Baldwin, 6 Wall, "122; Jackson vs. Beach, 1 Johns., cases 401; Craig vs. "Radford, 3 Wheat., 594; Fairfax's Devisee vs. Hunter's "Lessee, 7 Cranch, 607; Governuer vs. Robertson, 11 "Wheat., 122. But in the case at bar we encounter a "class of real estate *sui generis*, viz: possessory rights to "mining claims on the public domain of the United States, "whose rights are endowed with the qualities of real "estate to a high degree. The land belongs to the "United States; but the government says that it will sell "this class of its lands to citizens of the United States,

"and to those who have declared their intention to be-
"come such, and to them only, and only to them when
"they have complied with certain laws of the United
"States, and local mining rules and regulations as to the
"location and possession of such claims. No other per-
"sons may apply to purchase from the United States.
"The mineral lands of the government are not open to
"exploration, occupation or purchase by aliens. An
"alien may not even take or hold real estate of this class
"any more than he may take or hold any real estate by
"descent. In descent it is the rule of law, and not the
"act of the party, that vests title in the heir. As to de-
"scent to an alien, the law says that it would be an idle
"thing to vest title in the alien by one Act of law and
"then take it from him by another, viz: office found.
"See Fairfax's Devisee vs. Hunter's Lessee, 7 Cr., 619.

"So, in conferring title to mining claims and the
"possessory rights thereto, such title and possessory rights
"are given only to the class of persons designated by the
"law, and by virtue of that law, and in the manner pres-
"cribed thereby. It would, therefore, be incongruous to
"hold that an alien could take and hold until office found
"these claims by the provisions of the law which says
"that its benefits are extended only to citizens, and those
"who have declared their intention to become such, and

"after he had so taken and held them, resort to office "found to deprive him of them.

"The parallel of the alien heir claiming by descent "and the alien miner, claiming under the mining laws, "seems to be complete, as to the principle, on due con- "sideration. To the alien is given no right to explore, "purchase, or occupy mineral lands.

"This being his situation as an alien, without even "the right to take or hold until office found, as he may "other real estate, then when he becomes a citizen there "is nothing, no previous taking or holding, or the right "thereto, to which his subsequent naturalization can re- "troact. We are, therefore, of the opinion that Moses "Manuel, as an alien when this action was commenced, "and when the title came to him as he claims, could not "be heard in court to assert his claim to the possessory "right to the mining claim in controversy, and that his "subsequent naturalization could not retroact as he urges. "As to the proposition last discussed, see Tibbitts vs. "Ah Tong, 4 Mont., 536."

It will be observed that the court, in their opinion, follow the case of Tibbitts vs. Ah Tong, *supra*.

It will be further observed that while they concede the general common law doctrine that while an alien can

take and hold real estate, by purchase or devise, until office found, they hold mining claims to be a class of real estate, *sui generis*, and not embraced within this common law doctrine. It will be further observed that they deny to the naturalization of the plaintiff in error any retroactive effect upon his deeds from Alfred Manuel, upon the ground that those deeds, not conveying to the plaintiff in error any title whatever, there was nothing upon which said naturalization could retroact. Said court holds that the acquisition of title from the government to mineral lands of the United States is analagous to the acquisition of title to real property under the law of descent and distribution. The learned court observes that: "As to de-"scent to an alien the law says that it would be an idle "thing to vest title in the alien by one Act of law and "then take it from him by another, to-wit, office found." We shall endeavor to show that the learned court is not sustained in their opinion upon this point by either reason or authority.

II.

Is the acquisition of title to the mineral lands of the United States analagous to the acquisition of title to lands by the law of descent? We will allow this Honorable Court to answer this question by the following extract

from the opinion of the court in the case of Governeur's heirs vs. Robertson et al., 11 Wheat., 322, to-wit:

"On this subject of relation, the authorities are so "ancient, so uniform and universal, that nothing can "raise a doubt that it has a material bearing on this "cause, but the question whether naturalization in Mary- "land was equivalent to naturalization in Kentucky * "* Nor, indeed, has he made a question on the subject "of relation back; yet it is not easy to see how he could "claim the benefit of an affirmative answer on the ques- "tion he has raised, without first extricating his cause "from the effects of the subsequent naturalization, upon "the rights derived to Brantz through his patent. The "question argued, and intended to be exclusively presen- "ted here, is, whether a patent for land to an alien be "not an absolute nulity.

"The argument is, that it was so at common law, "and that the Virginia land laws, in some of their pro- "visions, affirm the common law on this subject.

"We think the doctrine of the defendant is not to be "sustained on either ground. * * * * *

"It is clear, therefore, that this doctrine has no suffi- "cient sanction in authority; and it will be found equally "unsupported by principle or analogy.

"The general rule is positively against it, for the "books, old and new, uniformly represent the King as a "competent grantor in all cases in which an individual "may grant, and any person *in esse* and not *civiliter* "*mortuus* as a competent grantee.

"It is argued that there is an analogy between this "case and that of the heir, or the widow, or the husband, "alien; no one of whom can take; but the king shall en- "ter upon them without office found. Whereas, an "alien may take by purchase and hold until divested by "office found. It is argued that the reason usually as- "signed for this distinction, to-wit, *nil frustra agit lex*, "may, with the same correctness, be applied to the case "of a grant by the king to an alien, as to one taking by "descent, dower or curtesy. That the alien only takes "from the king to return the subject of the grant back "again to the king by escheat. But this reasoning ob- "viously assumes as law the very principle it is intro- "duced to support; since, unless the grant be void, "it cannot be predicated of it that it was executed in "vain. It is also inconsistent with a known and familiar "principle in law, and one lying at the very root of the "distinction between taking by purchase and taking by "descent. It implies, in fact, a repugnancy in language, "since the very reason of the distinction between aliens

"taking by purchase, and by descent is, that one takes "by deed, and the other by act of law: whereas, a "grantee, *ex vi termini*, takes by deed and not by act of "law. If there is any view of the subject in which an "alien, taking under grant, may be considered as taking "by operation of law, it is because the grant issues, and "takes effect, under a law of the State. But this is by no "means the sense of the rule, since attaching to it this "idea would be to declare the legislative power of the "State incompetent to vest in an alien even a defeasible "estate.

"That an alien can take by deed, and can hold until "office found, must now be regarded as a positive rule of "law, so well established that the reason of the rule is "little more than a subject for the antiquary."

It will be observed that this court, in the above case, directly holds that there is no analogy or parallelism between an alien taking by descent and by grant from the State. The learned Supreme Court of Montana admits the doctrine that as to all other real estate except the mineral lands of the United States, an alien can take by purchase and hold until office found. They extend this doctrine to water rights:

Quigley vs. Birdseye, 11 Mont., 444.

But they deny that it applies to the acquisition of title to the mineral lands of the United States. If the government had granted a patent to the plaintiff in error to the mining claim in controversy it would be good until office found, according to the doctrine laid down in the case of Governeur's heirs vs. Robertson et al., *supra*.

III.

If the ground located as the Marshall Ney lode by Alfred Manuel was public domain at the time it was located, the effect of this location would be to seggregate such ground from the public domain and vest in the locator a possessory right to the same, which immediately becomes clothed with all the attributes of property and which the locator can hold as against all the world, including the Government of the United States, so long as he complies with the conditions of the law as to representation work. The locator has the undoubted right to sell and convey such property as fully as he may sell and convey any other species of real estate.

Such locator becomes to all intents and purposes the grantee of the government. He has not only the right of possession, but he has the right to extract the ores from the claim located, and dispose of the same for his own benefit. And this he may do until he exhausts the

mine of all its precious metals, and thus he can get all the practical benefit out of the mine that there is in it, without purchasing the same and procuring a patent. The government cannot prevent this.

Nothing but a failure on the part of a locator to comply with the conditions of the grant as to annual representation and compliance with the local rules and regulations, can defeat his grant.

It is admitted doctrine that where the government has once made a grant of a thing it cannot make a second grant, and any attempt to do so would be a nulity. By virtue of Section 2319, of the Revised Statutes of the United States, the government makes the broad proposition to all citizens, and those who have declared their intention to become such, that they may explore the public mineral lands of the United States. By Section 2322 the government declares that when such qualified persons have made discovery of mineral lands, and complied with the law, they shall have the exclusive right to possession and enjoyment of the same, etc. Any such qualified person, therefore, complying with these propositions made by the government, becomes *ipso facto* the grantee of the government. And the rights thus granted we have seen are of a highly substantial character. Too much so to be denominated an "easement," or for the grantee

to be denominated the "assignee" of the government. Let us consider some of the rights which the locator acquires from the government simply by virtue of his location and compliance with the law:

1. Such locator can protect himself against any invasion as fully as though he had a patent to the ground.

Armstrong vs. Lower, 6 Cal., 333.
Guillin vs. Donnellam, 115 U. S., 45.
Noyes vs. Mantel, 127 U. S., 348.
Spencer vs. Winselman, 42 Cal., 479.

2. In the case of Forbes vs. Gracy, 94 U. S., 762, this court uses the following language: "These claims "are the subject of bargain and sale, and constitute very "largely the wealth of the Pacific Coast States. They "are property in the fullest sense of the word, and their "ownership, transfer and use, are governed by a well "defined code or codes of law, and are recognized by the "States and Federal Government. These claims may be "sold, transferred, mortgaged and inherited, without in-"fringing the title of the United States."

See also:

Aspen M. Co. vs. Rucker, 28 F. 220.
Stark vs. Starr, 6 Wall., 418.
Pacific Coast M. Co. vs. Sparge, 16 F. 348.
Garthe vs. Hart, 73 Cal., 541.

Smokehouse Lode Case, 6 Montana, 397.
Talbot vs. King, 6 Montana, 76.
Silver Bow M. Co. vs. Clarke, 5 Montana, 378.
Belk vs. Meagher, 104 U. S., 279.

3. Such a claim is subject to dower.

Black vs. Elkhorn Company, 49 F. 549.

If, then, the locator of a mining claim acquire such a substantial property on the claim located as is shown by the foregoing authorities, it is difficult to see why he cannot convey this property by deed to an alien, as well as he could any other kind of real property. The title to such claim would pass by virtue of the contract of sale evidenced by the deed. It would not pass by virtue of the operation of the law like a title by descent.

What difference can there be between the holding by an alien of ordinary land and of mining claims? The common law prohibits an alien from procuring and holding the title to lands. The statute equally, but not more so, prohibits an alien from locating and acquiring title to mineral lands. The incapacity to hold exists in each case. As to other lands it is admitted that notwithstanding this incapacity an alien may take by purchase or devise, and hold until office found.

Why may not the alien, then, take by purchase from a qualified locator of a mining claim who is vested with title of such a substantial and high order, as we have seen such locator acquires on his mining claim?

Is there any more sanctity in the Statute of the United States than in the common law? Does the Statute repeal the common law by prohibiting a qualified locator from conveying to an alien, and declaring such attempt a nulity?

IV.

It seems to us that there is a broad distinction between an alien locating a mining claim, and taking by purchase or devise such claim from a qualified locator. It will be found that upon a review of the authorities in most of the cases in which an alien has been denied the right to hold a mining claim until office found, have been cases in which such alien was the locator. We believe no cases will be found except, perhaps, some *dicta* in which the doctrine laid down in the case of Tibbitts vs. Ah Tong, 4 Montana, is held. The case of Chapman vs. Tong Long, 4 Sawy., 28 comes nearer sustaining the Montana court than any other case which we have been able to find. In this case certain claims were in the possession of Chinamen. Qualified locators located the

ground while they were thus in possession, and sought an injunction restraining them from further work upon the claims. It does not appear from the report of the case whether the Chinamen were holding under any location or not. All that appears is that they were in possession working the claims. Judge Deadey granted the injunction in that case. The distinction between this case and the case of Tibbitts vs. Ah Tong, is that in the latter case the claim which the defendants were in possession of had been located by a qualified locator and such defendant Chinaman was in possession and holding by purchase from such locator. It may be the fact that Ah Tong was a Chinaman, and not only not naturalized, but not capable of being naturalized, may have had some bearing in the decision of that case.

In the case of Chapman vs. Tong Long, the plaintiffs, out of ten claims which the Chinamen were in possession of, only located nine and one-half of them, leaving to the Chinamen one-half claim. This leads the learned Judge, who decided that case, to remark: "For this act "of self-denial the 'heathen Chinee,' who appeared to "have no rights on Poor Man Creek, that a miner is "bound to respect, and who had probably bought this "ground and long worked it as their own, are doubtless "daly thankful." Yet, to compare small things with great,

"if, at some distant day, the moral of this predatory transaction should be called in question, the defendants will hardly have cause to exclaim with Lord Clive, when charged in the House of Commons with helping himself to the treasury of Bengal, after the signal victory of Plassey, 'I am astonished at my own moderation.'"

In the foregoing case the decision seems to have been based mainly upon a provision of the Constitution of Oregon, prohibiting Chinamen, not residents of the State of Oregon, at the time of the adoption of the Constitution, from holding any real estate or mining claim, or working in any mining claim therein.

In the case of Lee vs. Justice Mining Company, 29 Pac., 1020, the claim in controversy was located by an alien, then conveyed in trust to a citizen for the benefit of another alien, and for the express purpose of acquiring title from the government. After such location by the alien the same claim was relocated by a qualified person, and the court held that such location by the alien was void. In the case of Le Doon vs. Tesh, 68 Cal., 45, the complaint alleged citizenship only in one of the locators. There was a demurrer to the complaint on this ground, and it was sustained by the court, holding that in an adverse proceeding it was necessary to allege and prove the citizenship of the locators. But the court in this case ex-

pressly approves the doctrine laid down in the case of Ferguson vs. Neville, 60 Cal., 359, which we will notice further on.

It is proper to observe that the court in the case of Lee vs. Justice Mining Company, cites with approval the case of Tibbetts vs. Ah Tong. In Anthony vs Jillson, 23 Pac., 419 the Supreme Court of California again held that an alien cannot acquire anything by locating a mining claim.

In the case of Ferguson vs. Neville, 61 Cal., 359, Supreme Court of California say: "It is admitted in the "record of the case, that the grantors of plaintiffs, al- "though Chinese, were all of them *bona fide* residents of "the State of California. It is very clear, therefore, that "Wing Hung and his co-grantees, were capable of taking "by purchase the mining ground in controversy, and "their grantors having acquired the title of the United "States to such mining ground, had a full and complete "right to convey the same.

"But we might concede that Wing Hung and his "associates had no right to take and hold the fee by pur- "chase, and the result, so far as the present decision is "concerned, would be the same. They could take and "hold until 'office found.'"

By the expression in the above quotation, "their "grantors having acquired the title of the United States "to such mining ground," it is not to be understood that the ground was patented, but the meaning is a possessory right having been acquired. The facts of that case are precisely on all fours with the facts of the case at bar. The claim in controversy, in both instances, had been located by citizens, but one party was endeavoring to deraign title through unnaturalized persons.

In the case of Gorman Mining Company vs. Alexander et al., 51 N. W., 340, the Supreme Court of South Dakota, in a well reasoned opinion, holds that an alien can take and hold an unpatented mining claim until office found. In that case the original locator was a citizen, and conveyed his possessory right to the claim to an alien. That court expressly disapproves the case of Tibbitts vs. Ah Tong, and says that the opinion of the dissenting Judge in that case more nearly expressed the views entertained by that court as applicable to the questions involved in the case. In the case of Billings et al vs. the Aspen Mining and Milling Company et al., 51 F. 338, the court holds that an alien may locate mineral land of the United States, and hold title to the possessory right thus created until office found, thus putting this kind of property upon the same footing of any other realty.

This opinion was affirmed upon a motion for rehearing and is reported in 52 F., 250. See also Croesus Mining M. & S. Co., vs. Colorado Land and Mineral Company, 19 F., 82.

V.

As to the doctrine of retroaction we need scarcely refer to authorities, as they are so numerous. But see the following:

Joseph Osterman et al vs. Harvey Baldwin, 6 Wall., U. S., Rep. 116.
Jackson vs. Beach, 1 Johnson Cases, 401.
Craig vs. Radford, 3 Wheat., 591.
Fairfax's Devisee vs. Hunter's Lessee, 7 Cranch, 607.
Elmondorf vs. Carmichael, 14 Am. Dec., 87 and notes.
Governeur vs. Robertson, 11 Wheat., 332.
Ferguson vs. Neville, 61 Cal., 350.
LeDoon vs. Tesh, 68 Cal., 48.

We have already seen, both by reason and authority, that this doctrine applies to possessory rights in the mineral lands of the United States. Hence, when Alfred Manuel conveyed such possessory right to the plaintiff in error, the latter took by purchase. That, therefore, he had by virtue of such conveyance whatever title Alfred Manuel had, and could hold the same until office found.

That this was his status at the time of his naturalization by the court before non-suit.

There was something, then, upon which such naturalization could retroact. He had the title against all the world to such possessory claim, and the very moment that he was naturalized all power on the part of the government, by office found, or otherwise, to deprive him of his title, was removed. It follows, therefore, that such naturalization completely cured the infirmity of alienage, and he ought to have been permitted to have retained his status in court, and asserted his rights under his counterclaim to the ground in controversy, if he was able to do so.

VI.

As a persuasive argument we suggest that the Interior Department of the Government uniformly recognizes this retroactive effect of naturalization when no adverse right has intervened.

In re, Ole O. Krogstad, 4 L. D., 564.
Lord vs. Perrin, 8 L. D., 536.
Jacob H. Edens' Case, 7 L. D., 229.
Morn vs. Huk, 3 L. D., 452.
Kelley vs. Quast, 2 L. D., 627.

VII.

We freely concede that in an application for a patent the applicant must show that he is a citizen of the United States, or has declared his intention to become such. We further concede that objections to the want of this qualification may be made by any one. Indeed it is the duty of the trial court to see that whoever he adjudges entitled to the claim, in an adverse proceeding for a patent, has this qualification.

The bringing of an adverse suit in the court is but a transfer of the proceeding from the land office and a continuation of the case. In such cases the "Sovereign is a "party in fact to the proceeding, which is a direct one "for the procurement of title, and the objection of alien- "age, no matter by whom suggested, is based solely up- "on the right of the government to interpose the fact of "alienage as a bar to procuring or holding an interest in "realty."

O'Reiley vs. Campbell, 116 U. S., 418.

If this objection to the alienage of the applicant in such proceeding is based solely upon the right of the government to interpose the fact of alienage, and not upon the right of the other party to the action, then it certainly must follow that when the alien is naturalized

and the ground of the objection on the part of the government is removed that the other party to the suit should be silenced.

If the procedure to obtain the patent had continued in the Land Office, and there had been no adverse, and it had appeared to the officers that the applicant was an alien at the time of his application, but had since become naturalized, they would not have rejected his claim on account of his alienage at the time he made his application. And this especially so in the light of the fact that the applicant had acted in good faith, believing that he was a citizen.

Croesus Mining Company vs. Colorado Company, 19 F., 78.

Sever vs. Gregovich, 16 Nev., 325.

VIII.

While we insist that an alien can take by purchase a possessory right to unpatented mineral lands of the United States, and hold until office found, and that the plaintiff in error, by virtue of such purchase of Alfred Manuel, the citizen locator, was the owner of such possessory right, and that his naturalization related back to the same when made; still, if we are wrong in this opinion, and the Court should sustain the Supreme Court of

Montana, in its opinion as laid down in the case of Tibbits vs. Ah Tong, and affirmed in this case, we insist that the same rule should be applied to the plaintiff below, and the defendant's motion to non-suit him should have been sustained. It will be observed that the Supreme Court of Montana avoided deciding this question by holding that it was not properly raised, for the reason that there was no pleading of forfeiture of the claim by the plaintiff below in the counter-claim of the plaintiff in error. While we concede the doctrine laid down by the Court, that where there is a forfeiture it must be pleaded in order to avail the party claiming the benefit of it, still we insist that this does not present a case of forfeiture. If that Court is right in its opinion that no title passes at all by virtue of a deed of a mining claim to an alien, then there was nothing in the plaintiff below to be forfeited. A forfeiture can only take place where a right has been acquired, and by some act or omission of the party holding such right he is deprived of the benefit of it. If a locator of mineral ground fails to do the annual representation work as required by law this works a forfeiture of his right to such ground. But in this case he has acquired no right by virtue of his location which can be forfeited. But if the deed from Pflaume to Fred Manuel, an alien, conveyed to him nothing, then the plaintiff below, by virtue of the deed from said Fred Manuel, ac-

quired nothing, and hence there was nothing in him to be forfeited. It was simply a failure of title, and as we have seen, the question of title in the plaintiff was directly put in issue by the pleadings. It would have been absurd to have put in a plea of forfeiture if the doctrine laid down by the Supreme Court of Montana, is the law.

IX.

The only effect that an honorable discharge from the service of a soldier in the Army of the United States can have upon his naturalization under Section 2166, United States Revised Statutes, is to dispense with the necessity of filing a declaration of intention and to reduce the time of previous residence from five to one year.

The Statute does not make such honorable discharge a substitute for the filing of a declaration of intention to become a citizen. He is not prohibited by the Statute from filing such declaration and reaping the benifits of the same.

Berry vs. Hull 50 P. 940-1.

The case was presented to the Supreme Court of the State by a statement on appeal under the Statute of Montana. Such statement is a part of the judgment roll and sets forth the alleged errors of law complained

of and properly brought them before that Court. So far as the review of these errors is concerned it was not necessary to have a motion for new trial at all.

No motion for a new trial as to the order or judgment of non-suit of plaintiff in error could have been entertained.

Kleinschmidt vs. McAndrews, 4 Mont., 33.

Respectfully Submitted,

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